SMGB Group Sdn Bhd lwn Apat a/l Ganesan dan lain-lain

MAHKAMAH TINGGI (TEMERLOH) — RAYUAN SIVIL NO CB-12B-17–12 TAHUN 2023
ROSLAN MAT NOR H
29 NOVEMBER 2024

Tort — Pencerobohan — Pencerobohan ke atas tanah — Responden mendakwa pencerobohan ke atas tanah oleh defendan kedua dan menuntut ganti rugi — Sama ada responden mempunyai locus standi — Sama ada ganti rugi yang diberikan oleh hakim mahkamah sesyen adalah teratur

Ini adalah rayuan terhadap keputusan hakim mahkamah sesyen ('HMS') yang membenarkan tuntutan responden-responden ('plaintif-plaintif') terhadap perayu ('defendan kedua'). Ia melibatkan dakwaan pencerobohan yang dilakukan oleh defendan kedua ke atas tanah-tanah milik plaintif-plaintif. Plaintif-plaintif adalah merupakan orang asal/orang asli yang mengusahakan tanaman di atas tanah berkenaan dan merupakan penduduk di kawasan tanah perkampungan orang asli tersebut. Defendan kedua membuat perusahaan perlombongan bijih di kawasan tanah tersebut. Ia menjejaskan plaintif-plaintif yang menjadi asas kepada tuntutan ganti rugi terhadap defendan kedua. HMS berpuas hati bahawa kawasan di mana pencerobohan berlaku adalah kawasan perkampungan orang asli berdasarkan pada Minit Mesyuarat Majlis Kerajaan Negeri Pahang yang secara asasnya mempersetujui bahawa tanah-tanah tersebut akan dinyatakan sebagai kawasan perkampungan orang asli. HMS juga berpuas hati bahawa kerosakan yang dialami oleh plaintif-plaintif adalah disebabkan oleh kegiatan yang dilakukan oleh defendan kedua. Setelah meneliti dokumen-dokumen yang berkaitan serta berdasarkan laporan penilaian oleh Jabatan Penilaian dan Perkhidmatan Harta ('JPPH'), HMS memberikan ganti rugi dan juga membenarkan ganti rugi teladan dan ganti rugi teruk. Isu-isu untuk pertimbangan adalah: (a) sama ada plaintif-plaintif mempunyai locus standi; dan (b) sama ada ganti rugi yang diberikan oleh HMS adalah teratur.

Diputuskan:

(1) Plaintif-plaintif yang sedang berada di atas tanah-tanah tersebut semasa kejadian pencerobohan oleh defendan kedua. Tanah-tanah tersebut adalah berada di dalam milikan plaintif-plaintif berdasarkan kepada kelulusan yang diberikan oleh pihak Kerajaan Negeri untuk pewujudan perkampungan orang asli. Tiada alasan untuk mengganggu dapatan HMS berkaitan dengan locus standi plaintif-plaintif untuk mengemukakan tindakan kepada defendan kedua. Seterusnya,

pencerobohan yang dilakukan adalah melibatkan defendan kedua dan tiada kaitan dengan pihak yang lain seperti yang dinyatakan oleh defendan kedua. Penilaian keterangan yang dilakukan oleh HMS tidak terkategori di dalam prinsip jelas kesilapannya yang memerlukan campur tangan mahkamah. Begitu juga ia tidak tergolong di dalam penilaian keterangan tidak mencukupi sehingga membolehkan mahkamah campur tangan dalam dapatan hakim bicara berkenaan dengan pencerobohan yang dilakukan oleh defendan kedua ke atas tanah-tanah plaintif (lihat perenggan 26–27 & 29).

(2) Ganti rugi yang diberikan oleh HMS kepada defendan adalah berdasarkan kepada tafsiran yang diberikan oleh JPPH. Defendan kedua bersetuju untuk membuat bayaran ganti rugi tersebut kepada plaintif-plaintif setelah mendapat nilaian daripada JPPH dalam Mesyuarat Majlis Kerajaan Negeri Pahang yang diadakan di antara plaintif dan defendan kedua. Oleh itu, ganti rugi yang diberikan oleh HMS kepada plaintif-plaintif ekoran daripada pencerobohan tersebut adalah wajar dan tidak ada alasan mengganggu dapatan tersebut (lihat perenggan 30–32).

(3) Fakta yang terdapat di dalam kes ini tidak sewajarnya dijadikan sandaran untuk membolehkan suatu ganti rugi teladan diberikan. Sebarang kerugian yang dihadapi akibat daripada kerosakan tanaman-tanaman plaintif dan tindakan mencemarkan Sungai Pandau tersebut adalah boleh dibuktikan melalui keterangan-keterangan bagi tujuan ganti rugi am dan ganti rugi khas dan tidak memerlukan kepada ganti rugi teladan. Berkenaan dengan ganti rugi teruk, ia akan hanya diberikan sekiranya terdapat keadaan kecederaan atau penderitaan yang dialami oleh pihak yang terkesan dengan tindakan tort plaintif. HMS telah terkhilaf apabila memberikan ganti rugi teruk dan ganti rugi teladan sedangkan keterangan yang dikemukakan tidak dapat menyokong bahawa plaintif-plaintif berhak untuk dipertimbangkan ganti rugi teruk dan ganti rugi teladan tersebut. Oleh itu, ganti rugi teruk dan ganti rugi teladan yang diberikan oleh HMS telah diketepikan (lihat perenggan 46–47 & 57).

[English summary

This was an appeal against the decision of the sessions court judge ('SCJ') in allowing the claim of the respondents ('the plaintiffs') against the appellant ('the second defendant'). It involved an allegation of trespass by the second defendant on land belonging to the plaintiffs. The plaintiffs were indigenous people who cultivated crops on the land and were residents in the indigenous village land area. The second defendant was engaged in ore mining in the land area. This had affected the plaintiffs, which was the basis for the claim for damages against the second defendant. The SCJ was satisfied that the area where the trespass had occurred was an indigenous village area based on the

Minutes of the Pahang State Government Council Meeting, which essentially agreed that the lands would be declared as an indigenous village area. The SCJ was also satisfied that the damage suffered by the plaintiffs was due to the activities carried out by the second defendant. After examining the relevant documents and based on the valuation report by the Valuation and Property Services Department ('JPPH'), the SCJ awarded damages and also allowed exemplary damages and aggravated damages. The issues for consideration were: (a) whether the plaintiffs had locus standi; and (b) whether the damages awarded by the SCJ were in order.

Held:

(1) The plaintiffs were on the lands during the incident of trespass by the second defendant. The lands were in the possession of the plaintiffs based on the approval granted by the State Government for the establishment of an indigenous village. There was no reason to disturb the SCJ's finding regarding the locus standi of the plaintiffs to bring an action against the second defendant. Furthermore, the trespass involved the second defendant and was unrelated to other parties as stated by the second defendant. The SCJ's evaluation of the evidence did not fall under the principle of plainly wrong, which would require court intervention. Likewise, it did not fall under the category of insufficient judicial appreciation of evidence such as to allow the court to interfere with the trial judge's finding regarding the trespass committed by the second defendant on the plaintiffs' lands (see paras 26–27 & 29).

(2) The damages awarded by the SCJ to the defendant were based on the interpretation given by the JPPH. The second defendant agreed to make payments for the damages to the plaintiffs after receiving the valuation from the JPPH in the Pahang State Government Council Meeting held between the plaintiffs and the second defendant. Therefore, the damages awarded by the SCJ to the plaintiffs as a result of the trespass were reasonable, and there was no reason to disturb the finding (see paras 30–32).

(3) The facts in this case should not be relied upon to allow for exemplary damages to be awarded. Any losses incurred as a result of damage to the plaintiffs' crops and the act of polluting the Pandau River could be proven through evidence for the purpose of general and special damages and did not require exemplary damages. With regard to aggravated damages, they would only be awarded if there was a state of injury or suffering experienced by the party affected by the plaintiff's tortious act. The SCJ erred in awarding aggravated and exemplary damages when the evidence admitted did not support that the plaintiffs were entitled to be considered for such damages. Therefore, the aggravated and exemplary damages awarded by the SCJ were set aside (see paras 46–47 & 57).]

Kes-kes yang dirujuk

Ahmad Ikhwan bin Ahmad Fauzi (mendakwa melalui bapa dan sahabat wakilnya Ahmad Fauzi bin Abdullah) lwn Ahmad Safwan Hanim bin Mohd Fahimi dan lain-lain [2021] 7 MLJ 1; [2020] 9 CLJ 379, MT (dirujuk)

Ahmad Ikhwan bin Ahmad Fauzi v Mohd Fahimi bin Endut (father and next of kin to Ahmad Safwan Hanim bin Mohd Fahimi) & Ors and another appeal [2024] 3 MLJ 192; [2024] 5 CLJ 1, MP (dirujuk)

Ashley v Chief Constable of Sussex Police [2008] 2 WLR 975, HL (dirujuk)

Cassell & Co Ltd v Broome and another [1972] 1 All ER 801, HL (dirujuk)

Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353, MR (dirujuk)

Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia [1979] 2 MLJ 101, MP (dirujuk)

Foo Poh Sang & Ors v Lim Teik Cheong (representative of the estate of Lim Seong Chun, deceased) [2006] 5 MLJ 523, MR (dirujuk)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, MP (dirujuk)

Henderson v Foxworth Investments Ltd and another [2014] 1 WLR 2600, MA (dirujuk)

Kerajaan Malaysia & Ors v Norfazlin bt Zamani [2024] 6 MLJ 878; [2024] CLJU 2069, MR (dirujuk)

Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals [2018] 3 MLJ 184, MP (dirujuk)

Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor [2021] 3 MLJ 365, MP (dirujuk)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, MT (dirujuk)

Nik Elin Zurina bt Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan [2024] 2 MLJ 150, MP (dirujuk)

Rookes v Barnad [1964] AC 1129, HL (diikut)

Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784; [2017] 1 LNS 500, MR (dirujuk)

Scott v Musial [1959] 2 QB 429, MR (dirujuk)

Warren v King [1964] 1 WLR 1, MR (dirujuk)

Watt or Thomas v Thomas [1947] AC 484, HL (dirujuk)

Undang-undang yang dirujuk

Akta Orang Asli 1954 ss 6, 7
Akta Undang-Undang Sivil 1956 s 7
Perlembagaan Persekutuan

Rayuan daripada: Guaman Sivil No CB-B52–1–12 Tahun 2020 (Mahkamah Sesyen, Temerloh)

Mohd Faizi bin Che Abu (Tengku Amalin & Faizi) bagi pihak perayu.
M Ramachelvam (Nurul Syuhada Abdullah bersamanya) (Rama-Rozi & Assoc) bagi pihak responden-responden.

Roslan Mat Nor H:

PENDAHULUAN

[1] Ini adalah rayuan terhadap keputusan hakim mahkamah sesyen yang telah membenarkan tuntutan plaintif-plaintif/responden-responden terhadap defendan kedua/perayu. Ia melibatkan dakwaan pencerobohan yang dilakukan oleh perayu ke atas tanah-tanah milik responden-responden. Mahkamah akan merujuk pihak-pihak seperti di dalam tuntutan di mahkamah sesyen sebagai pihak plaintif-plaintif dan defendan kedua.

[2] Plaintif-plaintif adalah merupakan orang asal/orang asli yang mendakwa telah mengusahakan tanaman di atas tanah yang berkenaan. Mereka juga mendakwa sebagai penduduk di kawasan tanah perkampungan orang asli tersebut.

[3] Defendan kedua dikatakan telah membuat perusahaan perlombongan bijih di kawasan tanah tersebut. Ia telah menjejaskan pihak plaintif-plaintif yang menjadi asas kepada tuntutan ganti rugi terhadap defendan kedua.

[4] Hakim mahkamah sesyen telah berpuas hati bahawa kawasan di mana penerobohan itu dikatakan berlaku adalah merupakan kawasan perkampungan orang asli berdasarkan kepada eksh P1 dan P2 yang dikemukakan semasa perbicaraan. Ia merupakan Minit Mesyuarat Majlis Kerajaan Negeri Pahang yang telah secara asasnya mempersetujui bahawa tanah-tanah tersebut akan dinyatakan sebagai kawasan perkampungan orang asli.

[5] Hakim mahkamah sesyen juga telah berpuas hati bahawa kerosakan yang dialami oleh pihak plaintif adalah disebabkan oleh kegiatan yang dilakukan oleh pihak defendan kedua.

[6] Semasa prosiding sedang berjalan di mahkamah pihak plaintif telah menarik balik tuntutan kepada defendan pertama dan meneruskan tuntutan kepada defendan kedua.

[7] Hakim mahkamah sesyen telah meneliti dokumen-dokumen yang

berkaitan terutamanya berkenaan dengan memorandum persefahaman di antara pihak plaintif dan defendan kedua serta dokumen yang berkaitan dengan penilaian yang dibuat oleh Jabatan Penilaian dan Perkhidmatan Harta ('JPPH') bagi menentukan kerosakan yang dihadapi oleh pihak plaintif. Hakim mahkamah sesyen di dalam alasan penghakimannya menyatakan bahawa terdapat persetujuan di antara pihak plaintif dan defendan kedua untuk pihak defendan kedua menyelesaikan pembayaran tersebut tersebut. Oleh tu hakim mahkamah sesyen telah berdasarkan kepada laporan penilaian tersebut telah memberikan ganti rugi yang telah dinyatakan di dalam perintah mahkamah sesyen.

ISU RAYUAN DALAM KES INI

[8] Mahkamah ini berpendapat bahawa di dalam kes ini terdapat isu-isu seperti berikut:

(a) adakah plaintif-plaintif mempunyai locus standi di dalam kes ini; dan

(b) adakah ganti rugi yang diberikan oleh hakim mahkamah sesyen teratur.

[9] Pihak defendan kedua berhujah bahawa hakim mahkamah sesyen telah terkhilaf apabila memutuskan bahawa plaintif-plaintif mempunyai locus standi. Ini adalah disebabkan kawasan tanah tersebut tidak pernah diwartakan sebagai kawasan orang asli atau kawasan yang dikhaskan untuk orang asli seperti di bawah ss 6 dan 7 Akta Orang Asli 1954.

[10] Sebaliknya peguam pihak plaintif berhujah bahawa hakim mahkamah sesyen telah betul apabila memutuskan bahawa pihak plaintif mempunyai locus standi berdasarkan kepada surat-surat dan Minit Mesyuarat Majlis Kerajaan Negeri Pahang yang dengan jelas menunjukkan bahawa tanah 400 ekar dinyatakan sebagai perkampungan orang asli.

[11] Pada masa yang sama pihak defendan kedua juga menyatakan bahawa hakim mahkamah sesyen terkhilaf apabila menyatakan bahawa tanah tersebut adalah tanah adat yang tidak dikemukakan sebarang keterangan bagi menyokongnya. Pihak defendan kedua berhujah bahawa tanah tersebut sebenarnya adalah tanah kerajaan. Plaintif-plaintif adalah merupakan penceroboh kepada tanah kerajaan tersebut. Oleh itu mereka tidak mempunyai locus standi untuk mengemukakan tindakan kepada pihak defendan kedua.

[12] Seterusnya defendan kedua juga menimbulkan isu berkenaan tiadanya keterangan yang menunjukkan bahawa defendan kedua telah terlibat dalam pencerobohan tanah tersebut. Sebaliknya ia adalah disebabkan oleh pihak ketiga iaitu Sykt Mentiga Mining Sdn Bhd. Malahan defendan kedua telah

cuba menguruskan masalah-masalah yang dihadapi oleh plaintif-plaintif dengan mengemukakan cadangan pembaikan kepada kerosakan tersebut.

[13] Sebaliknya peguam pihak plaintif menyatakan bahawa dalam semua dokumen yang dikemukakan dinyatakan dengan jelas bahawa defendan kedua adalah merupakan pihak yang terlibat di dalam kerosakan yang dialami oleh pihak plaintif. Malahan tiada langsung sebarang petanda yang menunjukkan Sykt Mentiga Mining Sdn Bhd tersebut telah terlibat dalam kerosakan tersebut. Saksi-saksi pihak plaintif mengesahkan bahawa mereka tidak mempunyai sebarang masalah dengan Sykt Mentiga Mining Sdn Bhd semasa tanah tersebut diusahakan oleh syarikat tersebut.

[14] Pihak defendan kedua juga menimbulkan isu berkenaan dengan ganti rugi teladan yang telah diberikan oleh hakim mahkamah sesyen yang menurut peguam defendan kedua tidak mempunyai asas untuk berbuat sedemikian. Tiada sebarang keterangan yang dapat menyokong jumlah yang telah dinyatakan oleh pihak plaintif tersebut.

ANALISA

[15] Adalah menjadi prinsip yang mantap bahawa mahkamah yang mendengar rayuan tidak sewajarnya campur tangan di dalam dapatan fakta.

[16] Mahkamah ini perlu berhati-hati dalam meneliti keterangan tersebut dan tidak bertindak melebihi wewenang mahkamah yang mendengar rayuan daripada keputusan mahkamah bicara. Mahkamah ini tidak sewajarnya menggantikan dapatan hakim mahkamah sesyen semata-mata disebabkan tidak bersetuju dengan dapatan tersebut. Sebaliknya hendaklah meneliti dapatan hakim mahkamah sesyen itu dalam jurus pandang undang-undang sama ada ia wajar diganggu atau sebaliknya seperti yang dinyatakan dalam kes *Watt or Thomas v Thomas* [1947] AC 484 seperti berikut:

> I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

[17] Begitu juga Lord Simonds dalam kes yang sama telah menyatakan seperti berikut:

> There I should be content to leave this case but for certain criticisms made by counsel for the respondent in his able and candid address. Relying on the testimony of certain witnesses called on behalf of the respondent (whom I need not name) he said that the learned Lord Ordinary had come to a conclusion which was diametrically opposed to that testimony, yet he had not explicitly stated that he did not accept them as witnesses of truth nor indeed, made any adverse comment upon them. Your Lordships were therefore invited to find that the learned judge had forgotten or ignored this evidence and to hold that his judgment was thereby vitiated. I believe this to be fundamentally unsound criticism. The trial judge has come to certain conclusions of fact; your Lordships are entitled and bound, unless there is compelling reason to the contrary, to assume that he has taken the whole of the evidence into his consideration. If his conclusion is inconsistent with the evidence of certain of the witnesses but he does not, in terms, stigmatize them as false witnesses, it is not the proper or necessary inference that he has forgotten or ignored them; of this the present case is a cogent example, for I can well understand why the Lord Ordinary, while not accepting his evidence, did not think fit to comment unkindly on one at least of the witnesses in question.

[18] Malahan Lord Du Parcq menyatakan seperti berikut dalam kes tersebut:

> All the authoritative decisions which relate to the proper attitude of an appellate court towards the findings of fact of the trial judge naturally tend to lay emphasis on one aspect of the question, either on the fact that the appellate court's duty to see justice done may constrain it to reject the judge's findings, or on the undesirability of deciding a case on a written record against the view of the judge who heard the witnesses. But, though one aspect may be emphasized, the other must always be present to the mind of the court. Thus, in *Yuill v Yuill (2)*, where the decision of the judge was reversed, Lord Greene MR said:
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> > It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.
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> My Lords, I am satisfied that this is not one of those very rare occasions. There are, no doubt, cases in which it is proper to say, after reading the printed record, that, after making allowance for possible exaggeration and giving full weight to the judge's estimate of the witnesses, no conclusion is possible except that his decision was wrong.

[19] Prinsip yang dinyatakan berkenaan dengan campur tangan Mahkamah Rayuan terhadap keputusan mahkamah bicara seperti yang dinyatakan dalam kes *Watt or Thomas v Thomas* di atas telah dinyatakan oleh Mahkamah Agong di United Kingdom dalam kes *Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600. Lord Reed menyatakan seperti berikut:

[63] In *Thomas* itself, Lord Thankerton, with whose reasoning Lord Macmillan, Lord Simonds and Lord du Parcq agreed, said that in the absence of a misdirection of himself by the trial judge, an appellate court which was disposed to come to a different conclusion on the evidence should not do so 'unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion'.

[64] Lord du Parcq's speech is to similar effect. Distinguishing the instant case from 'those very rare occasions' on which an appellate court would be justified in finding that the trial judge had formed a wrong opinion, he said, at p 493:

> There are, no doubt, cases in which it is proper to say, after reading the printed record, that, after making allowance for possible exaggeration and giving full weight to the judge's estimate of the witnesses, no conclusion is possible except that his decision was wrong.

[65] Viscount Simon, at p 486, while disagreeing as to the result of the appeal, also emphasised the need for the appellate court to consider whether the trial judge's decision could reasonably be regarded as justified:

> If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight.

[66] These dicta are couched in different language, but they are to the same general effect, and assist in understanding what Lord Macmillan is likely to have intended when he said that the trial judge might be shown 'otherwise to have gone plainly wrong'. Consistently with the approach adopted by Lord Thankerton in particular, the phrase can be understood as signifying that the decision of the trial judge cannot reasonably be explained or justified.

[67] It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

[68] This approach is consistent, as I have explained, with the Scottish authorities, and also with more recent authority in this court and in the Judicial Committee of the Privy Council: see, for example, *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, paras 52–53, per Lord Neuberger of Abbotsbury PSC. A similar approach has also been adopted by the Supreme Court of Canada (see *HL v Canada (Attorney General)* [2005] 1 SCR 401, paras 55–56) and by the United States Supreme Court: see *Anderson v Bessemer City* (1985) 470 US 564, 573–574.

[20] Pendekatan campur tangan mahkamah yang mendengar rayuan terhadap dapatan dan keputusan hakim bicara ini dikenali sebagai prinsip jelas kesilapannya (*plainly wrong*). Mahkamah Persekutuan telahpun menjelaskan pemakaian prinsip tersebut semasa mendengar rayuan daripada mahkamah bawahan dalam kes *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 seperti berikut:

> [71] From the aforesaid authorities, there appears to be a difference in approach taken and applied by the UK Supreme Court and the approach taken by the Malaysian courts. Whilst Lord Reed in *Henderson* separated the four non exhaustive identifiable errors of a trial judge from the plainly wrong test:
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> (i) a material error of law;
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> (ii) a critical finding of fact which has no basis in the evidence;
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> (iii) demonstrable misunderstanding of relevant evidence; and
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> (iv) a demonstrable failure to consider relevant evidence;
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> (all of which justifies appellate intervention of a trial judge's decision), this court in *Gan Yook Chin* effectively included them under what amount to the trial judge as being 'plainly wrong'.
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> [72] The phrase 'lack of judicial appreciation of evidence' used in *Gan Yook Chin* could very well encompass three out of four errors of a trial judge (other than the 'material error of law') said to be identifiable by Lord Reed in *Henderson*, namely:
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> (i) critical factual finding which has no basis in evidence;
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> (ii) demonstrable misunderstanding of relevant evidence; and
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> (iii) demonstrable failure to consider relevant evidence.
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> [73] Given that the issue at present is about identifying situations where the findings of fact by a trial court justify appellate intervention, the other identifiable error of 'material error of law' listed by Lord Reed in *Henderson* can occur when a trial judge erroneously apply legal principles (eg rules of evidence) in the course of making a finding of fact, thus resulting in a lack of judicial appreciation of evidence. For example, when a trial judge erroneously placed a burden of proof on a party, that will lead the judge to misdirect himself when he attempts to interpret the factual matrix before him. The commission of material error of law by the trial judge in arriving at his conclusions (eg, the requirement of proof of intention in constructive trust as opposed to express trust), also justifies an appellate court reversing such conclusions.
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> [74] Thus, whilst there is a slight difference in approach of appellate intervention, both the UK Supreme Court and our Federal Court effectively shares a common thread where it has been held that appellate intervention is justified where there is lack of judicial appreciation of evidence.
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> [75] The Court of Appeal in Singapore applies the plainly wrong test which is similar to our Federal Court, as illustrated in *Damu Jadhao v Paras Nath Singh*

[1976] 1 MLJ 151; [1965] CLJU 30; [1965] 1 LNS 30 when it held:

> The principles under which an appellate court acts when an appellant seeks to displace the conclusion arrived at by a trial judge on questions of fact have been very recently restated by the Privy Council in the case of *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] 1 MLJ 87 at p 92; [1964] CLJU 202; [1964] 1 LNS 202 need only refer to a passage of the judgment of Lord Guest when dealing with the matter, where he states:
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> > Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion. This case seems to me to be completely dependent on the trial judge's estimate of the credibility of the appellant and his witnesses and nothing that counsel for the appellant has put forward in his arguments before me has persuaded me that the trial judge's view of the credibility of the witnesses before him was in any way plainly wrong.

[76] What is pertinent is that, the 'plainly wrong' test is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts.

[77] It is to be observed that this court in *Tengku Dato' Ibrahim Petra Tengku Indra Petra* had referred to *McGraddie* and *Henderson* and has adopted the *Henderson* approach of the 'plainly wrong' test in determining whether the trial court's findings of fact is reversible upon appeal:

> Recently in *Henderson v Foxworth Investments Ltd and Another* [2014] 1 WLR 2600, the United Kingdom Supreme Court held that in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had not interfered with the factual finding which had no basis in the evidence, an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached, and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[78] Hence following this court's ruling in *Tengku Dato' Ibrahim Petra Tengku Indra Petra* an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[21] Pada masa yang sama mahkamah juga perlu memberikan perhatian

semasa meneliti rayuan perayu bagi menentukan sama ada terdapatnya keperluan untuk mengganggu dapatan hakim bicara. Ia sejajar dengan apa yang dikenali sebagai kegagalan hakim bicara yang tidak membuat penilaian keterangan secara mencukupi (*insufficient judicial appreciation of evidence*). Ia perlu dilihat hubung kait di antara prinsip jelas kesilapannya (*plainly wrong*). Hubung kait di antara penilaian keterangan secara mencukupi (*insufficient judicial appreciation of evidence*) dan prinsip jelas kesilapannya (*plainly wrong*) telah dijelaskan oleh Mahkamah Rayuan dalam kes *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 seperti berikut:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

Isu (a)

[22] Berkenaan dengan isu locus standi, mahkamah merujuk kepada kes *Nik Elin Zurina bt Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan* [2024] 2 MLJ 150 yang telah memberikan takrifan ringkas berkenaan dengan locus standi seperti berikut:

> [22] Locus standi refers to the standing or right of the person to sue. The most recent decision by this court on this issue is that in *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829; [2023] 5 CLJ 167 ('Taman Rimba'). In that case, the court endorsed the minority judgment of Eusoffe Abdoolcader SCJ in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 ('Lim Kit Siang'). Summarising the analysis therein, locus standi ought to be relaxed as much as possible to allow any public-spirited person to file a public law suit provided that he has some interest in the matter.

[23] Begitu juga dengan rumusan yang menarik dalam artikel bertajuk *Modern Concept of Locus Standi In Malaysia: Nik Elin Zurina's Case* [2024] 6 CLJ i seperti berikut:

Locus standi is a fundamental principle in litigation that requires a party to have the capacity to bring a legal action in court. If a party lacks this capacity, the court can strike out the action.

[24] Persoalannya dalam kes ini adakah plaintif-plaintif mempunyai locus standi bagi satu tindakan pencerobohan dan gangguan. Adakah hanya pemilik berdaftar sebidang tanah yang mempunyai locus standi untuk mengambil tindakan terhadap defendan kedua. Oleh itu mahkamah perlu melihat kepada undang-undang tort berkaitan dengan pencerobohan tanah dan hubung kaitnya dengan locus standi seperti yang dinyatakan dalam *Winfield & Jolowicz on Tort* (15th Ed) by WVH Rogers seperti berikut:

Trespass to land is the name given to that form of trespass which is constituted by unjustifiable interference with the possession of land. Contrary to popular belief trespass is not criminal in the absence of some special statute which makes it so.

Trespass to land, like the tort of trespass to goods which is considered in a later chapter, consists of interference with possession, and it is necessary to say something here of this concept.

[25] Begitu juga di dalam buku *Clerk & Lindsell on Torts,* Sweet & Maxwell (17th Ed) 1995 di halaman 842 yang menerangkan tentang siapakah yang boleh menyaman bagi tindakan pencerobohan seperti berikut:

Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both. A tenant in occupation can sue, but not a landlord, except in cases on injury to the reversion. Similarly a person in possession can sue although he neither is the owner nor derives title from the owner, and indeed may be in possession adverse to the owner.

[26] Mahkamah ini berpendapat hakim mahkamah sesyen telah dengan betul memutuskan bahawa plaintif-plaintif yang sedang berada di atas tanah-tanah tersebut semasa kejadian pencerobohan oleh pihak defendan kedua. Hakim mahkamah sesyen juga adalah betul apabila memutuskan bahawa tanah-tanah tersebut adalah berada di dalam milikan plaintif-plaintif berdasarkan kepada kelulusan yang diberikan oleh pihak Kerajaan Negeri untuk pewujudan perkampungan orang asli sebanyak 400 ekar seperti yang dinyatakan di perenggan [10] di atas.

[27] Berdasarkan kepada penganalisaan di atas mahkamah ini berpendapat tiada alasan untuk mengganggu dapatan hakim mahkamah sesyen berkaitan dengan locus standi plaintif-plaintif untuk mengemukakan tindakan kepada defendan kedua. Ini adalah konsisten dengan prinsip bahawa bagi tort pencerobohan tanah, pihak yang berada di atas tanah tersebut mempunyai locus standi terhadap pihak yang menceroboh. Fakta bahawa seseorang itu bukan pemilik berdaftar tanah tidak menyekat dan menyebabkan dia tidak mempunyai locus standi di dalam tort pencerobohan tanah.

[28] Seterusnya mahkamah ini juga perlu mempertimbangkan hujahan yang dikemukakan oleh pihak defendan kedua bahawa tindakan pencerobohan ini sebenarnya dilakukan oleh Sykt Mentiga dan bukannya syarikat defendan kedua. Namun demikian dokumen-dokumen yang dikemukakan di hadapan hakim bicara setelah penelitian dilihat telah diputuskan oleh hakim mahkamah sesyen bahawa tidak terdapatnya nama pihak lain selain daripada pihak defendan kedua yang terserlah di dalam mesyuarat di antara pihak plaintif dan pihak defendan kedua. Ia juga dapat dilihat dalam surat-surat rasmi yang dikeluarkan oleh Jabatan Penilaian dan Perkhidmatan Harta (JPPH) kepada Jabatan Kemajuan Orang Asli ('JAKOA') dan juga persoalan-persoalan ataupun permohonan daripada pihak JAKOA kepada pihak JPPH. Ia juga dapat dilihat melalui memorandum persetujuan bersama (MoU) yang dimeterai di antara pihak-pihak. Persoalannya adakah fakta-fakta itu telah menyebabkan hakim mahkamah sesyen telah membuat dapatan yang salah yang memerlukan kepada gangguan daripada mahkamah ini. Perkara itu juga perlu dipertimbangkan oleh mahkamah ini.

[29] Mahkamah ini berpendapat hakim mahkamah sesyen telah membuat dapatan yang tepat berdasarkan kepada keterangan saksi-saksi dalam kes ini bahawa pencerobohan yang dilakukan adalah melibatkan defendan kedua dan tiada kaitan dengan pihak yang lain seperti yang dinyatakan oleh defendan kedua. Penilaian keterangan yang dilakukan oleh hakim mahkamah bicara pada hemat mahkamah ini tidak terkategori di dalam prinsip jelas kesilapannya (*plainly wrong*) yang memerlukan campur tangan mahkamah ini. Begitu juga ia tidak tergolong di dalam penilaian keterangan secara mencukupi (*insufficient judicial appreciation of evidence*) sehingga membolehkan mahkamah ini campur tangan dalam dapatan hakim bicara berkenaan dengan pencerobohan yang dilakukan oleh defendan kedua ke atas tanah-tanah pihak plaintif. Oleh itu mahkamah bersetuju dengan dapatan hakim mahkamah sesyen berkenaan dengan perkara ini.

Isu (b)

[30] Mahkamah ini mendapati bahawa hakim mahkamah sesyen di dalam alasan penghakimannya telah memberikan ganti rugi kepada pihak defendan berdasarkan kepada tafsiran yang diberikan oleh Jabatan Perkhidmatan dan Penilaian Harta (JPPH) seperti dinyatakan di eksh P12 yang menyatakan seperti berikut:

Bil	Pengadu	Nilaian
1	Tarak bin Batin Deok (plaintif keempat)	RM32,000
2	Apat a/l Ganeson (plaintif pertama)	RM30,000
3	Nita a/p Apat (plaintif kedua)	RM12,800

Bil	Pengadu	Nilaian
4	Wee a/l Gaud (plaintif kelima)	RM4,200
5	Hetty a/p Gaud (plaintif keenam)	RM5,600
6	Rawi a/l Gaud (plaintif ketiga)	RM16,100

[31] Ini ditambah pula dengan persetujuan defendan kedua untuk membuat bayaran ganti rugi tersebut kepada plaintif-plaintif setelah mendapat nilaian daripada JPPH dalam Mesyuarat Majlis Kerajaan Negeri Pahang yang diadakan di antara pihak plaintif dan defendan kedua yang digambarkan melalui P9.

[32] Oleh itu mahkamah berpendapat isu berkenaan dengan ganti rugi yang diberikan oleh hakim mahkamah sesyen kepada plaintif-plaintif ekoran daripada pencerobohan tersebut adalah wajar dan tidak ada alasan untuk mahkamah ini mengganggu dapatan tersebut.

GANTI RUGI TELADAN DAN GANTI RUGI TERUK

[33] Hakim juga dalam alasan penghakimannya telah membenarkan ganti rugi teladan dan ganti rugi teruk iaitu ganti rugi teladan sebanyak RM150,000. Sementara ganti rugi teruk juga sebanyak RM150,000.

[34] Alasan hakim mahkamah sesyen memberikan jumlah tersebut adalah kegiatan yang dilakukan oleh defendan kedua yang bersangkutan dengan perlombongan bukan sahaja menyebabkan kerosakan ke atas tanah plaintif-plaintif malahan ia juga mencemarkan Sungai Pandau yang menjadi punca air untuk penduduk orang asli Sungai Leleh. Di samping itu hakim mahkamah sesyen juga berpendapat keterangan yang dikemukakan di mahkamah menunjukkan aduan telah dikemukakan kepada pihak defendan kedua namun tiada sebarang kerja-kerja membaikpulih dilaksanakan oleh defendan kedua maka ini mewajarkan ganti rugi teruk dan ganti rugi teladan diawardkan kepada plaintif-plaintif.

[35] Hakim bersandarkan kepada kes *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500. Penelitian kepada kes tersebut menunjukkan bahawa ia adalah merupakan tindakan yang berpunca daripada tindakan perobohan oleh pihak penguatkuasa yang telah merobohkan binaan di atas tanah serta beberapa aset telah tidak dipulangkan kepada plaintif dalam kes tersebut. Plaintif telah memfailkan tindakan terhadap defendan bagi pencerobohan, kecuaian dan pemecahan tanggungjawab statutori dan salah laku pegawai awam. Atas asas itulah maka Mahkamah Rayuan mengesahkan bahawa ganti

rugi teladan dan ganti rugi teruk wajar diberikan.

[36] Dalam kes tersebut Mahkamah Rayuan telah menjelaskan berkenaan dengan dengan kedudukan ganti rugi teladan dan ganti rugi teruk seperti berikut:

> [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.
>
> [33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff (see *Rookes v Barnard* [1964] 1 All ER 347*; AB v Southwest Water Services* [1993] All ER 609; *Broome v Cassell & Co* [1971] 2 QB 354; *Laksamana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675; [2005] 4 CLJ 871).

[37] Mahkamah ini berpendapat bagi menentukan sama ada suatu ganti rugi teladan itu perlu diberikan wajar mahkamah merujuk kepada kes *Rookes v Barnad* [1964] AC 1129 yang menyatakan seperti berikut:

> I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behavior. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.
>
> Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes* case *Lofft 1* can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be enquiry if the conduct were criminal; and, moreover, a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham v Gambling* [1941] AC 157 and place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough.
>
> Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant.

[38] Ganti rugi teladan dan kewajaran untuk diberikan telah dinyatakan oleh Mahkamah Rayuan dalam kes *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353 seperti berikut:

> [77] As to whether exemplary damages should be awarded, we see no clearer case as in this case where it must be given to reflect the severity of the breach. The circumstances in which the deceased's Constitutional right was breach have been dealt with in detail by the learned judge and affirmed by us earlier in our grounds. Any reasonable tribunal in our view would conclude that this is an appropriate case to award exemplary damages. Not to award such exemplary damages would in our mind be 'not attending to the mutilation with the appropriate care'.
>
> [78] As for the quantum of the exemplary damages, there is also noreason to disturb the award granted by the learned judge as itcommensurate with the actions of the defendants.

[39] Dalam kes tersebut tuntutan dibuat oleh keluarga simati yang telah meninggal di dalam lokap atau semasa tahanan polis. Ia adalah disebabkan tindakan tersebut telah bercanggah dengan kebebasan asasi yang dijamin di bawah Perlembagaan Persekutuan.

[40] Dalam hal ini Mahkamah Persekutuan pula berpandangan bahawa ganti rugi teladan tidak boleh diberikan sekiranya terdapat tuntutan di bawah s 7 Akta Undang-Undang Sivil 1956. Ini adalah disebabkan terdapat prinsip yang tersendiri berkenaan dengan ganti rugi teladan yang berbeza dengan undang-undang berkaitan dengan ganti rugi biasa yang berbentuk pampasan. Ini dinyatakan dalam kes *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184 seperti berikut:

> [179] The absence of a provision disallowing the grant of exemplary damages in s 7 must be viewed in the context of its compensatory nature and its difference from s 8. In *Rookes v Barnard and others* [1964] AC 1129, Lord Devlin said at p 1221:
>
> > Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter.
>
> [180] An award of exemplary damages under s 7 is clearly contrary to the legislature's intention in enacting that section. The legislature obviously did not anticipate that such an award would be made. Hence, an express provision disallowing such an award is not required in s 7.

[41] Seterusnya Mahkamah Persekutuan telah menjelaskan keadaan bagaimanakah seseorang itu boleh dipertimbangkan bagi diberikan ganti rugi teladan dalam kes *Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint*

administrator and dependant of Chandran a/l Perumal, deceased) & Anor [2021] 3 MLJ 365 seperti berikut:

> [132] Thus, in view of art 162(6) and the aforesaid settled principles on statutory interpretation, the question which we posed to ourselves in order to answer the legal poser granted in the leave to appeal is this: Is s 8(2) of the CLA incongruous with art 5 of the Federal Constitution? My answer to that is a definite no, for as laid out in *Rookes*'s case in order to be entitled to exemplary damages, the plaintiff himself must be the victim of the punishable behaviour for its object is not to compensate him but to punish the defendant and to deter him and others in the same shoes or similar position from committing such wrongs. In the words of Lord Devlin in *Cassell & Co Ltd v Broome* [1972] AC 1027 at p 1126:
>
> > The plaintiff must himself have been the victim of the conduct of the defendant which merits punishment: he can only profit from the windfall if the wind was blowing his way.
>
> Given that the deceased victim is not suing but his estate is, that condition for exemplary damages is not met in this case.

[42] Dalam kes *Rookes v Barnard* telah memberikan panduan kepada mahkamah ini untuk menimbangkan sama ada ganti rugi teladan wajar diberikan atau sebaliknya oleh hakim mahkamah sesyen. Dalam buku *McGregor Law on Damages* (16th Ed, Sweet & Maxwell 1997) telah menyatakan tiga keadaan di mana ganti rugi teladan boleh diberikan seperti berikut:

> First common law category: oppressive, arbitrary or unconstitutional conduct by government servants.
>
> The first of the two common law categories comprises cases in which, in Lord Devlin's words in *Rookes*, there has been 'oppressive, arbitrary or unconstitutional action by the servants of the government'. This category is based primarily on the eighteenth-century cases which introduced the general doctrine of exemplary damages.
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> Second common law category: conduct calculated to result in profit.
>
> The second of the two common law categories comprises cases in which, again in Lord Devlin's words in *Rookes*, 'the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff', As with the first common law category, the general justification advanced was that here exemplary damages could serve a useful purpose in vindicating the law's strength, 'but, once again, it is the particular justification which is the more important'.
>
> Third, express authorisation by statute. In the past, it has been known for statutes expressly to empower the courts to award exemplary damages in respect of particular wrongs where this is justified by the conduct of the defendant.

[43] Bagi memahami dengan lebih jelas berkenaan dengan dengan keadaan

dan hakikat ganti rugi teladan itu adalah wajar mahkamah ini memperturunkan penghakiman di dalam kes *Rookes v Barnard* melalui penghakiman Lord Devlin seperti berikut: A

> These authorities convince me of two things. First, that your Lordships could not, without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary images can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that whatI am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not, therefore, conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance they may be said to afford. B C D
>
> The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category — I say this with particular reference to the facts of this case — to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and, very likely, the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not, in my opinion, punishable by damages. E F G
>
> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. I have quoted the dictum of Erle CJ in *Bell v Midland Railway Co* Maule J in *Williams v Currie* suggests the same thing; and so does Martin B in an obiter dictum in *Crouch v Great Northern Railway Co*. It is a factor also that is taken into account in images for libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably layered exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object — perhaps some property which he covets — which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay. H I

To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute.

[44] Apakah yang perlu dipertimbangkan oleh mahkamah dalam memberikan ganti rugi teladan telah dijelaskan oleh Lord Hailsham dalam kes *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801 seperti berikut:

I turn now to Lord Devlin's three 'considerations'. It is worth pointing out that neither the Court of Appeal nor any of the counsel who appeared before us attacked these as such. Nor, so far as I am aware, have these been attacked in the cases in which Commonwealth judges have felt constrained to criticise *Rookes v Barnard*. This alone would be a good reason against a simple return to the status quo ante proposed by the Court of Appeal, because the first and second 'considerations' coupled with the passage from which I have already are themselves, and quite independently of the 'categories', an important, and I think original, contribution to the law on exemplary damages. Whilst, as I have indicated, I cannot myself follow what Lord Devlin says on the second category so far as regards the right of appellate courts to interfere with jury awards on principles different from the traditional, nor, I think, with the proposal that *Benham v Gambling* offers a precedent for arbitrary limits imposed by the judiciary in defamation cases, I regard it as extremely important that, for the future, judges should make sure in their direction to juries that the jury is fully aware of the danger of an excessive award. A judge should first rule whether evidence exists which entitles a jury to find facts bringing a case within the relevant categories, and, if it does not, the question of exemplary damages should be withdrawn from the jury's consideration. Even if it is not withdrawn from the jury, the judge's task is not complete. He should remind the jury: (i) that the burden of proof rests on the plaintiff to establish the facts necessary to bring the case within the categories; (ii) that the mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character; they can and should award nothing unless; (iii) they are satisfied that the punitive or exemplary element is not sufficiently met with the figure which they have arrived at for the plaintiff's solatium in the sense I have explained; and (iv) that, in assessing the total sum which the defendant should pay, the total figure awarded should be in substitution for and not in addition to the smaller figure which would have been treated as adequate solatium, that is to say, should be a round sum larger than the latter and satisfying the jury's idea of what the defendant ought to pay. (v) I would also deprecate, as did Lord Atkin in *Ley v Hamilton* (1935) 153 LT 384 at 386, the use of the word 'fine' in connection with the punitive or exemplary element in damages, where it is appropriate. Damages remain a civil, not a criminal remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that, in making such an award they are putting money into a plaintiff's pocket, and not contributing to the rates, or to the revenue of central government.

[45] Apa yang jelas daripada duluan-duluan kehakiman di atas ialah ganti rugi teladan tidak boleh diberikan dengan sewenang-wenangnya dengan hasrat untuk menambah ganti rugi yang boleh diberikan melalui pembuktian

keterangan-keterangan yang dikemukakan di mahkamah yang dibuat melalui tafsiran ganti rugi sama ada ganti rugi am atau ganti rugi khas. Mahkamah perlu meneliti sama ada terdapat keterangan yang menunjukkan tingkah laku defendan termasuk di dalam tiga kategori yang dinyatakan dalam kes *Rookes v Barnard* di atas.

[46] Dalam kes ini mahkamah perlu menimbangkan sama ada keadaan di dalam kes ini mewajarkan ganti rugi teladan diberikan kepada plaintif-plaintif. Adakah memadai tindakan defendan kedua menjalankan aktiviti perlombongan sehingga merosakkan serta mencemarkan Sungai Pandau yang menjadi punca air untuk penduduk orang asli Sungai Leleh memadai untuk suatu ganti rugi teladan diberikan. Adakah keadaan sedemikian dalam kes ini telah mematuhi ujian di dalam kes *Rookes v Barnard* tersebut. Mahkamah berpendapat fakta yang terdapat di dalam kes ini tidak sewajarnya dijadikan sandaran untuk membolehkan suatu ganti rugi teladan diberikan. Sebaliknya mahkamah berpendapat sebarang kerugian yang dihadapi akibat daripada kerosakan tanaman-tanaman plaintif dan tindakan mencemarkan Sungai Pandau tersebut adalah boleh dibuktikan melalui keterangan-keterangan bagi tujuan ganti rugi am dan ganti rugi khas dan tidak memerlukan kepada ganti rugi teladan.

[47] Sementara itu berkenaan dengan ganti rugi teruk mahkamah juga perlu mengambil perhatian bahawa ia akan hanya diberikan sekiranya terdapat keadaan kecederaan atau penderitaan yang dialami oleh pihak yang terkesan dengan tindakan tort plaintif. Ini telah dinyatakan dalam kes *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 di mana Lord Newberger menyatakan seperti berikut:

> [102] Aggravated damages are awarded for feelings of distress or outrage as a result of the particularly egregious way or circumstances in which the tort was committed, or in which its aftermath was subsequently handled by the defendant. If that is so, I cannot see why such damages should not logically be recoverable in some categories of negligence claims. In the present case, for instance, it must have been reasonably foreseeable (the normal tort test) that a negligently mishandled armed police raid could result in just the sort of mental distress or shock that aggravated damages are intended to reflect. It appears to me that it would be reminiscent of the bad old days of forms of action if the court held that the Ashleys' claim could result in aggravated damages if framed in battery, but not if framed in negligence. In my view, there is a strong enough case for saying that aggravated damages would be recoverable for the instant negligence for the point to have been validly conceded by the chief constable.

[48] Ia telah diterima pakai oleh Mahkamah Persekutuan dalam kes *Koperal Zainal bin Mohd Ali* yang menyatakan seperti berikut:

> [136] What Lord Neuberger said in *Ashley*'s case at p 996 para 102 is equally

instructive on this point and is reproduced below:

> [102] Aggravated damages are awarded for feelings of distress or outrage as a result of the particularly egregious way or circumstances in which the tort was committed, or in which its aftermath was subsequently handled by the defendant.

In this case, there is no denying the exacerbation of the above-mentioned feelings by the very fact that the deceased had died due to the inaction of the ones who were there to enforce the law.

> [137] Therefore, based on the authorities cited above whilst at the same time giving due deference to the express prohibition in s 8(2) of the CLA, the respondents in this case should be entitled to be compensated with aggravated damages which amount must reflect the sufferings of the deceased and at the same time the sheer abhorrence of the court against the negligent conduct of the appellants, even though the degree of its seriousness is not on the same footing as other reported cases where the deaths of the detainees were the result of physical abuse by their custodians. Factoring such feeling of the court is permissible as held by Lord Hailsham in *Broome*'s case at p 1073:
>
> > In awarding 'aggravated' damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.

[49] Malahan jika ditinjau keputusan mahkamah berkenaan dengan ganti rugi teruk ini fakta di dalam suatu kes yang pada kaca mata mahkamah boleh dipertimbangkan ganti rugi teruk telah tidak dibenarkan oleh mahkamah. Ini dapat dilihat dalam kes *Ahmad Ikhwan bin Ahmad Fauzi (mendakwa melalui bapa dan sahabat wakilnya Ahmad Fauzi bin Abdullah) lwn Ahmad Safwan Hanim bin Mohd Fahimi dan lain-lain* [2021] 7 MLJ 1; [2020] 9 CLJ 379. Dalam kes tersebut fakta yang diperturunkan dalam penghakiman tersebut menunjukkan seperti berikut:

> [7] Akibat daripada kejadian serangan dan buli tersebut, plaintif menyatakan bahawa beliau telah mengalami kecederaan yang teruk, kejutan dan tekanan perasaan, trauma dan kehilangan tumpuan pembelajaran yang teruk. Plaintif juga mengalami perasaan takut yang mana mengakibatkan plaintif telah bertukar ke Sekolah Menengah Sultan Sulaiman untuk menyambung pelajaran pada 16 Julai 2015.

[50] Namun Mahkamah Tinggi tidak memberikan sebarang ganti rugi teruk. Ia telah disahkan oleh Mahkamah Persekutuan dalam kes *Ahmad Ikhwan bin Ahmad Fauzi v Mohd Fahimi bin Endut (father and next of kin to Ahmad Safwan Hanim bin Mohd Fahimi) & Ors and another appeal* [2024] 3 MLJ 192; [2024] 5 CLJ 1 seperti berikut:

[53] In respect of the award for aggravated damages and exemplary damages, we decline to award any aggravated damages or to increase the award on exemplary damages.

[51] Mahkamah juga meneliti keputusan Mahkamah Rayuan yang telah memberikan ganti rugi teruk. Ia berdasarkan kepada penelitian keterangan di dalam sesuatu kes bagi mewajarkan pemberian ganti rugi teruk. Ini dapat dilihat misalnya dalam kes *Kerajaan Malaysia & Ors v Norfazlin bt Zamani* [2024] 6 MLJ 878; [2024] CLJU 2069 seperti berikut:

Aggravated damages

(a) defendant admitted liability on 11 February 2022 some 17 months after the exchange of expert opinion and after PW1 had completed his expert evidence;

(b) lackadaisical attitude of the doctors and nurses in ignoring the plaintiff complains of pain and gross haematuria immediately after the caesarean surgery. The signs of bloodstained urine were missed by the medical officer and nurses;

(c) the plaintiff had to again undergo a second laparotomy when the portex drain snapped while it was being pulled out of her body. This was due to the poor vigilance and technique in the use of the portex drain;

(d) the plaintiff was a full fee-paying patient and she had been given to understand that she will be attended to by a specialist of her owned choice. She was instead attended to by a medical officer. She was deprived of her right to be attended to by another specialist to undertake the surgery;

(e) the counsel for the plaintiff suggested RM500,000; and

(f) the court awarded RM150,000 to assuage the sense of wrong and harm caused to the plaintiff by the conduct of the defendants.

[52] Pada masa yang sama mahkamah juga perlu berhati-hati agar tidak dengan sewenang-wenangnya mengubah dapatan hakim bicara berkaitan dengan ganti rugi teladan dan ganti rugi teruk. Ini adalah disebabkan hakim mahkamah sesyen mempunyai budi bicara untuk mempertimbangkan ganti rugi teladan dan ganti rugi teruk tersebut. Ini adalah disebabkan mahkamah tidak sewajarnya mengganggu dapatan berkaitan dengan ganti rugi sekiranya tiada sebarang salah arah dalam pemberian ganti rugi tersebut. Ini dinyatakan dalam kes *Warren v King* [1964] 1 WLR 1.

[53] Moris LJ dalam kes *Scott v Musial* [1959] 2 QB 429 menyatakan seperti berikut:

In these days the responsibility of assessing the amounts of damages rests, in the great majority of cases, with judges sitting alone. Some eminent judges have, in recent times, voiced the opinion that determinations by juries would often be

helpful. Thus, Singleton LJ in this court in *Bocock v Enfield Rolling Mills Ltd* said:

> It has been said more than once that a judge sitting by himself is not in as good a position to assess damages as are twelve members of a jury. They have an opportunity of discussing the matter among themselves, and though they may not have great experience in the matter, twelve heads should be better than one.

In the following year, in *Dolbey v Goodwin*, Lord Goddard CJ said:

> This court is always reluctant to interfere in these cases, because we know the difficulty that all judges have in coming to a decision in them. I think it is about as difficult a task as could possibly be put on a judge, and so I always feel when I am sitting at *nisi prius*. I have often felt that in really serious cases of this kind it is better to have a jury because the opinion of twelve people is probably more satisfactory than the opinion of one.

[54] Seterusnya pendekatan yang perlu digunakan oleh mahkamah yang mendengar rayuan berkenaan dengan ganti rugi yang perlu diberikan telah dinyatakan dengan menarik oleh Moris LJ seperti berikut:

> In cases which are comparable but which are decided by different judges, a certain pattern or level of awards of damages may emerge. If, however, an award of a jury does not seem to conform to such pattern, that is not to prove that the jury is necessarily wrong. The views of juries may form a valuable corrective to the views of judges. The jury will not necessarily have knowledge of any pattern or level which judges have thought to be appropriate, and the jury are not bound by any such pattern or level. Of course it is inevitable that members of the Court of Appeal, when considering a complaint against the award of a jury, will formulate individual views as to the figure of damages which they themselves would have deemed appropriate. That will be comprehended within, and will be one part of the process of deciding, whether the jury's award is out of all proportion to the circumstances of the case. It must, however, be no more than a part of that process. The figure of an award by a jury is not to be deemed to be wrong merely because judges might have arrived at a different figure.
>
> Where, therefore, a jury is charged with the responsibility of assessing damages, their conclusion will only be assailed or displaced if attack can be made upon it on the lines that I have mentioned.

[55] Penelitian kepada kes di tanah air menunjukkan bahawa Mahkamah Rayuan boleh campur tangan di dalam penggunaan budi bicara hakim sekiranya ia dilakukan dengan tidak mengikut jalur undang-undang. Ini dapat dilihat dalam kes *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia* [1979] 2 MLJ 101.

[56] Begitu juga Mahkamah Rayuan dalam kes *Foo Poh Sang & Ors v Lim Teik Cheong (representative of the estate of Lim Seong Chun, deceased)* [2006] 5 MLJ 523 telah menyatakan seperti berikut:

[8] Needless to say the high degree of culpability called for to warrant a striking out is absent in this case. The plaintiffs' complaint is that although the judge referred to all the relevant principles he failed to have regard to the peculiar facts of the present case when applying them. We think that there is merit in this complaint as we have attempted to demonstrate in this judgment. This is accordingly a case in which the court below failed to take into account relevant considerations when exercising its discretionary power to strike out. Accordingly, this is a case in which appellate intervention is clearly warranted.

[57] Dalam kes ini mahkamah berpendapat hakim mahkamah sesyen telah terkhilaf apabila memberikan ganti rugi teruk dan ganti rugi teladan sedangkan keterangan yang dikemukakan tidak dapat menyokong bahawa plaintif-plaintif berhak untuk dipertimbangkan ganti rugi teruk dan ganti rugi teladan tersebut. Kedudukan plaintif-plaintif tidak menepati ujian dalam kes *Rookes v Barnard* dan ia adalah satu keadaan yang memerlukan campur tangan mahkamah ini. Oleh itu mahkamah mengenepikan ganti rugi teruk dan ganti rugi teladan yang telah diberikan oleh hakim mahkamah sesyen.

Perintah sewajarnya.

Dilaporkan oleh Nabilah Syahida Abdullah Salleh